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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. SAUL VILLA AVALOS, Defendant and Appellant.	G055039 (Super. Ct. No. SWF024768) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Riverside County, Becky Dugan, Judge. Reversed and remanded for resentencing.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Britton Lacy and Amanda E. Casillas, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Saul Villa Avalos appeals from a postjudgment order denying his petition/application for resentencing (the resentencing petition) brought under Health and Safety Code section 11361.8, subdivision (b),[1] by which he sought to have a prior felony conviction for possession of marijuana for sale reduced to a misdemeanor. The trial court found Avalos ineligible for relief because he had also been convicted of murder at the time he was convicted of possession of marijuana for sale.

At the time Avalos committed the offense of possession of marijuana for sale, he had not been convicted of murder. We therefore conclude the trial court erred by finding the murder conviction made Avalos ineligible for relief. In reaching that conclusion, we follow the decision of our colleagues in *People v. Smit* (2018) 24 Cal.App.5th 596 (*Smit*).

The remedy ordinarily would be a reversal and remand for the trial court to decide whether granting defendant relief "would pose an unreasonable risk of danger to public safety." (§ 11361.8(b).) But this case has a wrinkle: The sentencing court stayed execution of sentence on count 2 for possession of marijuana for sale and imposed sentence on count 4 for selling, furnishing, administering, transporting, or giving away more than 28.5 grams of marijuana. In a prior opinion, we reversed the judgment on count 4 but, following issuance of the remittitur, the trial court did not lift the stay of execution of sentence on count 2.

Because execution of sentence on count 2 remains stayed, it is unclear whether the governing provisions are sections 11361.8(a) and 11361.8(b) or sections 11361.8(e) and 11361.8(f). Sections 11361.8(a) and 11361.8(b) govern when the

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[1] Undesignated code sections are to the Health and Safety Code. We refer to section 11361.8, subdivision (b) as section 11361.8(b). In like fashion, we refer to section 11361.8, subdivision (a) as section 11361.8 (a), section 11361.8, subdivision (e) as section 11361.8(e), and section 11361.8, subdivision (f) as section 11361.8(f).

defendant is currently serving the sentence and provides for relief unless the trial court finds that granting the petition "would pose an unreasonable risk of danger to public safety." (§ 11361.8(b).) Sections 11361.8(e) and 11361.8(f) govern when the defendant has completed the sentence and provides for automatic relief once eligibility is established. Because execution of sentence on count 2 is stayed, Avalos does fall within either category: He is not currently serving a sentence on count 2 and has not completed sentence on that count.

As we explain, the wrinkle can be ironed out by directing the trial court to lift the stay of execution of sentence on count 2, resentence Avalos, and at that point reconsider the resentencing petition under whichever subdivisions of section 11361.8 are applicable.

BACKGROUND

In May 2008, Avalos was charged by information with five counts: (1) first degree murder with premeditation, deliberation, and malice (Pen. Code, § 187, subd. (a) [count 1]); (2) possession of marijuana for sale (§ 11359 [count 2]); (3) unlawful possession of an assault weapon (Pen. Code, former § 12280, subd. (b) [count 3]); (4) selling, furnishing, administering, transporting, or giving away more than 28.5 grams of marijuana (§ 11360, subd. (a) [count 4]); and (5) unlawfully carrying a loaded firearm (Pen. Code, former § 12031, subd. (a)(1) [count 5]). The offenses charged were alleged to have occurred in February 2008.

A jury found Avalos guilty of first degree murder as charged in count 1 and found true an allegation alleged under Penal Code section 12022.53, subdivision (d). The trial court sentenced Avalos to a total prison sentence of 50 years to life. The court sentenced Avalos under count 2 to the middle term of two years, but stayed execution of sentence pursuant to Penal Code section 654. The sentences on counts 3 and 4 were made concurrent to the indeterminate sentences.

Avalos appealed. In a prior nonpublished opinion, *People v. Avalos* (Mar. 11, 2014, G049101), we reversed the judgment on count 4 but otherwise affirmed. On our own motion, we take judicial notice of our prior opinion. (Evid. Code, §§ 452, subd. (d); 459, subds. (a), (b) & (c).)

In February 2017, Avalos filed the resentencing petition under section 11361.8(b) to have his conviction under count 2 reclassified as a misdemeanor. On the application, he checked the box alleging "Petitioner is currently serving the sentence for the crime noted above, and requests the sentence be recalled and that he/she be resentenced or the charge dismissed as required by law."

The district attorney opposed the resentencing petition. The district attorney asserted Avalos was not entitled to relief because he had suffered a conviction for murder under Penal Code section 187, subdivision (a).

The trial court denied the resentencing petition on the ground Avalos was ineligible for relief due to the murder conviction. On the form order, the trial court did not check the box to make a finding that granting the petition would pose an unreasonable risk of danger to public safety.

DISCUSSION

I.

Proposition 64 and Section 11361.8

Proposition 64, which was passed by the electorate in 2016, legalized recreational marijuana use and reduced the penalties on various marijuana-related charges, including possessing marijuana for sale. (§ 11359; see *Smit*, *supra*, 24 Cal.App.5th at p. 600.) As pertinent here, Proposition 64 amended section 11359 to make possession of marijuana for sale a misdemeanor unless (1) the defendant has at least one "prior" serious or violent felony conviction, (2) the defendant has at least one "prior" conviction for an offense requiring registration pursuant to Penal Code section 290, subdivision (c), (3) the defendant has two or more "prior" convictions under section

11359, subdivision (b), or (4) the offense occurred in connection with sale to a minor. (§ 11359, subd. (c).)

"Proposition 64 also added section 11361.8, a vehicle by which a defendant currently serving a sentence for a conviction for any of a number of marijuana-related statutes, including section 11359, may petition the trial court for resentencing or dismissal of the drug conviction if the offense is no longer a crime or is now a lesser offense." (*Smit, supra*, 24 Cal.App.5th at p. 600.) The nature of the relief permitted by section 11361.8 depends on whether the defendant is currently serving or has completed a sentence for the conviction. If the defendant is "currently serving a sentence," then section 11361.8(a) and section 11361.8(b) control and the relief offered is recall or dismissal of sentence. If the defendant has "completed his or her sentence," then section 11361.8(e) and section 11361.8(f) control and the relief offered is dismissal of the conviction and redesignation of the conviction as a misdemeanor or an infraction.

Section 11361.8(a) states, in relevant part: "A person currently serving a sentence for a conviction, whether by trial or by open or negotiated plea, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing or dismissal."

When a defendant files a petition under section 11361.8(a), the trial court must presume the defendant qualifies for relief unless the party opposing the petition proves by "clear and convincing evidence" the defendant does not satisfy the criteria set forth in section 11361.8(a). (§ 11361.8(b).) If the defendant qualifies for resentencing, the trial court must grant the defendant relief unless it "determines that granting the petition would pose an unreasonable risk of danger to public safety." (§ 11361.8(b).)

Section 11361.8(e) states, in relevant part: "A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, whether by trial or open or negotiated plea, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction . . . ."

When a defendant files a petition under section 11361.8(e), the trial court must presume the defendant qualifies for relief unless the party opposing the application "proves by clear and convincing" evidence that the defendant does not satisfy the criteria in section 11361.8(e). (§ 11361.8(f).) If the defendant satisfies the criteria in section 11361.8(e), the trial court must grant the defendant relief. Section 11361.8(f), unlike section 11361.8(b), does not give the trial court discretion to deny relief on finding that granting the application would pose an unreasonable risk of danger to public safety.

II.

Avalos's Murder Conviction Does Not Make Him Ineligible for Relief Under Section 11361.8.

Under section 11359, possession of marijuana for sale, is a felony if the defendant has "one or more prior convictions for an offense" identified in Penal Code section 667, subdivision (e)(2)(C)(iv). (§ 11359, subd. (c)(1).) The trial court denied the resentencing petition because Avalos also had been convicted of murder, which is among the offenses identified in Penal Code section 667, subdivision (e)(2)(C)(iv). The Attorney General argues Avalos was not entitled to relief under section 11361.8(a) because, had Proposition 64 been in effect when Avalos committed the offense of possession of marijuana for sale, he would have been guilty of a felony due to the murder conviction.

The statutory language does not support the Attorney General's position. Section 11361.8(a) states the defendant is presumptively entitled to relief if the defendant "would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect *at the time of the offense*." (Italics added.) At the time Avalos committed the offense of possession of marijuana for sale, he did not have a murder conviction. He did not have "one or more *prior* convictions for an offense" identified in Penal Code section 667, subdivision (e)(2)(C)(iv) and therefore the possession for sale offense would have been charged as a misdemeanor and could not have been charged as a felony.

Avalos's murder conviction was the product of the same trial that produced the conviction for possession of marijuana for sale. In *Smit, supra,* 24 Cal.App.5th 596, a panel of this court addressed an identical situation and concluded "a concurrent conviction for attempted murder in the same case in which defendant was charged and convicted of possessing marijuana for sale does not render defendant ineligible on the marijuana count." (*Id.* at p. 599.) The defendant in *Smit* had been convicted in the same proceeding of four counts of attempted murder, one count of conspiring to commit murder, one count of possession of marijuana for sale, and various other drug-related offenses. (*Ibid.*) The trial court summarily denied the defendant's petition for resentencing under section 11361.8(a) on the ground the defendant was ineligible for resentencing due to the concurrent convictions for attempted murder. (*Smit, supra,* at p. 599.)

The Court of Appeal, viewing the matter as a question of statutory interpretation, concluded the trial court had erred. The court examined the plain language of section 11361.8 and 11359 and held: "The fact that defendant was convicted of attempted murder in the same case in which he seeks relief under section 11361.8 does not make him ineligible for resentencing. This is because section 11361.8 makes an individual eligible for resentencing if he or she would not have been convicted of felony

possession of marijuana for sale had the Act been in effect when he was charged with possessing marijuana for sale. (§ 11361.8(a).) In other words, a defendant is eligible for relief *unless* he could have been charged and convicted of a felony violation of section 11359, even if the Act been in effect at the time of the charged incident. [¶] At the time defendant was charged with felony possession of marijuana for sale, he had not suffered any prior conviction of a so-called super strike. Thus, had the Act been in effect in 2009, the year of the alleged violation in this matter, defendant would not have been charged, much less convicted, of a felony for possessing marijuana for sale. Being charged with a super strike in the same case in which the defendant is charged with possession of marijuana for sale does not, under the Act, make the marijuana possession charge a felony. The statute requires a 'prior conviction[].' (§ 11359, subd. (c)(1).) [¶] Because defendant did not have a super strike prior conviction at the time he was charged with possessing marijuana for sale, he could not have been convicted in this case of felony possession of marijuana for sale. He would have been convicted of a misdemeanor violation. (§ 11359, subd. (b).) Thus, the subsequent convictions for attempted murder and conspiracy to commit murder did not render him ineligible for resentencing." (*Smit, supra*, 24 Cal.App.5th at p. 602.)

The Court of Appeal emphasized, however, that its analysis only made the defendant eligible for resentencing. (*Smit, supra*, 24 Cal.App.5th at pp. 603-604.) "On remand, the superior court will have to decide whether granting defendant relief 'would pose an unreasonable risk of danger to public safety.' (§ 11361.8, subd. (b).)" (*Smit, supra*, 24 Cal.App.5th at p. 604.)

We agree with *Smit*, which comports with our own interpretation of Proposition 64. When, in February 2008, Avalos committed the offense of possession of marijuana for sale, he did not have a conviction for murder or any of the other offenses identified in Penal Code section 667, subdivision (e)(2)(C)(iv). Thus, had Proposition 64 been in effect in February 2008, Avalos's conviction for possession of marijuana for sale

would have been a misdemeanor rather than felony, and, as a consequence, he is eligible for relief under section 11361.8.

III.

We Remand to Lift the Stay of Execution of Sentence on Count 2.

Our conclusion that Avalos satisfied the criteria for relief under section 11361.8, does not end the analysis. The resentencing petition sought relief under section 11361.8(b), under which a trial court may deny relief on the ground that granting the petition "would pose an unreasonable risk of danger to public safety." Avalos contends his resentencing petition should be deemed to have been made pursuant to section 11361.8(e) and section 11361.8(f), under which relief is automatic once the criteria for relief are satisfied.

Execution of sentence on count 2 was, however, stayed under Penal Code section 654. Which subdivisions of section 11361.8 apply in that situation? Because execution of sentence on count 2 had been stayed, it seems that Avalos neither is currently serving a sentence for the conviction on count 2 (section 11361.8(a)) nor has completed his sentence for that conviction (section 11361.8(e)).

We first need to address whether the stay of execution of sentence on count 2 remains in effect. The reason for the stay was sentence had been imposed on count 4. The three-year sentence on count 4 was to run concurrent to the indeterminate terms of 25-years-to-life for murder and the firearm enchancement. In the prior opinion, we reversed the judgment on count 4. "When section 654 applies, the proper procedure is to impose sentence on both counts and stay execution of sentence on one of the counts. [Citations.] The stayed sentence becomes permanent upon completion of the sentence on the other count . . . . [Citation.] However, should the conviction on the count for which sentence was imposed be overturned, the sentencing court then merely lifts the stay on the section 654 count." (*People v. Sanchez* (2016) 245 Cal.App.4th 1409, 1415.)

After issuance of the remittitur in this case, another sentencing hearing was conducted. The trial court dismissed count 4 but said nothing regarding count 2. The court stated, "[a]ll other orders remain in full force and effect" and this ruling was carried into the court minutes. The clerk's transcript includes a second abstract of judgment for the indeterminate sentences (count 1 and the firearm enhancement), but does not include a second abstract of judgment for the determinate sentences on counts 2 and 3. On the second abstract of judgment there is no check mark in the box at line seven to indicate there is an additional determinate term. As the Attorney General points out, "[i]t appears that the Penal Code section 654 stay was not lifted upon remand for resentencing when this court ordered vacated the conviction on count 4."

Although we reversed the conviction on count 4, we must conclude, absent an order or direction in the trial court minutes, execution of sentence on count 2 remains stayed under Penal Code section 654. This situation presents a conundrum both in theory and practice. Section 11361.8 provides only two alternatives: (1) the defendant is "currently serving a sentence for a conviction" (§ 11361.8(a)) and (2) the defendant "has completed his or her sentence" (§ 11361.8(e)). As Avalos argues, the Judicial Council form for requesting relief under section 11361.8 only offers those two options. Because the stay of execution of sentence on count 2 was not lifted, Avalos is not currently serving a sentence for the conviction on that count but has not completed his sentence either.

We conclude the best approach is to remand for the trial court to lift the stay of execution of sentence on count 2 and to resentence Avalos accordingly. Avalos argues if the stay is lifted on count 2, he has completed his sentence on that count and is entitled to relief under section 11361.8(e). The Attorney General disagrees. That determination should be made by the trial court in the first instance. The order denying the resentencing petition under section 11361.8 is reversed on the ground the trial court erred by finding Avalos did not meet the criteria for relief due to the murder conviction,

and that matter is remanded. Based on the result of resentencing, the trial court shall again consider the resentencing petition, which shall be deemed to have been made under whichever subdivisions of section 11361.8 would be appropriate under the circumstances.

DISPOSITION

The order denying the resentencing petition under section 11361.8 is reversed and the matter is remanded with directions to the trial court to lift the stay of execution of sentence on count 2, resentence Avalos, and reconsider his resentencing petition under whichever subdivisions of section 11361.8 are applicable.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.